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Supreme Court of the United States

OCTOBER TERM, 1961

No. 836

W.M.C.A., Inc., R. PETER STRAUS, JOSEPH De MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Appellants,

against

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, ABE STARK, President of the City Council of the City of New York, A. HOLLY PATTERSON, Chairman, Board of Supervisors, Nassau County, OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

On Appeal From the United States District Court
for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees Attorney General and Secretary of State, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment

of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument, or, in the alternative, that this appeal be dismissed.

Statutes Involved

The relevant state constitutional and statutory provisions are set forth in Appendix B of appellants' jurisdictional statement. We summarize them here briefly for the convenience of the Court.

The system for apportioning seats, in both the State Senate and Assembly, is contained in N. Y. Const. Art. III, §§ 2-5. While more than one Senate or Assembly District can be contained within the whole of a single county, and while a given Senate district may consist of more than one county, no county border line can be broken in the formation of either type of district.

The total number of Assemblymen is fixed at 150, with every county except Hamilton (which shares one Assemblyman with Fulton County) entitled to one Assemblyman. Sixty-one seats are thus accounted for. The remaining 89 seats, however, are apportioned in this manner: The citizen population of the State is divided by the total number of Assemblymen, and the quotient thus achieved becomes the "ratio." Every county whose citizen population equals 1½ times the "ratio" is entitled to a second Assemblyman. The rest of the seats are then apportioned among those counties with citizen populations greater than twice the "ratio." Seats apportioned on remainders are apportioned in order of highest remainders, with the proviso that no county shall have more Assemblymen than a county with a larger citizen population.

The Senate districts are created primarily on the basis of citizen population. A "ratio" is determined by dividing the citizen population of the State by 50 (the number

of Senators); Senate districts are then formed by combining or dividing counties so that each district contains approximately this number (the "ratio") of citizens. The Constitution provides that each district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact a form as practicable. There are four further provisos: When any county is entitled to more than three Senators, the Senate is enlarged from its minimum size (50) by the number of these additional Senators; no county can have four or more Senators unless it has a full population ratio for each; no county shall have more than one third of all the Senators; and no two counties that are adjoining or separated by one public waterway shall have more than half of all the Senators.

The most recent redistricting pursuant to these provisions went into effect in 1954.

Statement of the Case

This is a class action brought under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 by the six individual appellants—residents of four of New York City's counties (Bronx, Kings, New York, Queens; the fifth, Richmond, is not represented), and Nassau and Suffolk Counties—and W.M.C.A., Inc., a New York corporation. Appellees are officials of State and local government who perform duties relating to election of state legislative representatives, in accordance with the State statutes. The complaint sought declaratory judgment that the formula contained in the State Constitution for apportioning legislative seats (Congressional districting is not here challenged) violates the Fourteenth Amendment and sought an injunction against further action by appellees pursuant to the challenged provisions.

Opinions Below

The three-judge District Court unanimously granted appellees' motions to dismiss the complaint. Each of the

three judges wrote a separate opinion. Judges RYAN and LEVET agreed that the Federal courts have jurisdiction to consider claims of malapportionment of state legislatures. They went on to consider the merits of the complaint; both agreed that a State could protect its less populous counties by guaranteeing them an adequate voice in the legislature (Jurisd. Statement, App. A, 21a, 28a). Thus, a majority of the Court decided that the complaint be dismissed—on the merits—for failure to state a claim.

Judge WATERMAN, concurring, thought that decisions of this Court prior to *Baker* v. *Carr*, 369 U. S. 186 (1962), made it mandatory to dismiss the complaint without considering its merits. Judge LEVET, in his opinion, noted his belief that the District Court's holding, dismissing the complaint on its merits, might be supplemented by an alternative holding that the relief sought was wanting in justiciability because of the difficulty of drafting a workable decree; this point was not dealt with by the other two members of the Court.

Argument

Appellants have advanced only one reason to show that this appeal raises substantial questions of public importance—they claim that the decision of the three-judge District Court, dismissing appellants' complaint for failure to state a claim, is contrary to this Court's holding in *Baker* v. *Carr*, 369 U. S. 186 (1962).

We submit that this contention is unfounded. The District Court held that it had jurisdiction to consider appellants' claim, and thus complied with the *Baker* decision. It then went on to consider the merits of the claim and held it insufficient under prior decisions of this Court, such as *MacDougall* v. *Green*, 335 U. S. 281 (1948), whose validity was most recently reiterated in *Baker*. The District Court holding, far from being inconsistent with any decision of

this Court, was in accordance with *MacDougall* and every other decision of this Court defining the scope of the equal protection clause.

There is no question involved in this appeal which has not been reduced to settled principle by these decisions.

(A)

We are compelled to begin with a restatement of this Court's holding in *Baker*, since appellants treat it as supporting their position in this appeal. In fact, this Court did not even adjudicate the merits of the Tennessee apportionment challenged in *Baker;* much less did it lend comfort to appellants' attack on New York State legislative apportionment. Carefully noting the distinction between dismissals for lack of jurisdiction and dismissals on the merits (30 U.S.L. Week at 4207), this Court limited its holding to the questions of jurisdiction and justiciability, and refused to discuss the merits of the *Baker* complaint.

In this context, it is bizarre to contend that the District Court's decision in this case is contrary to *Baker*. The District Court held that it had jurisdiction of the action, and went on to determine the merits; once having assumed jurisdiction, it satisfied the mandate later announced in the *Baker* decision. It is equally bizarre to suggest (Jurisd. Statement, pp. 10-11) that this appeal should be dealt with in the same manner as *Scholle* v. *Secretary of State*, 360 Mich. 1, 104 N. W. 2d 63 (1960), *vacated*, No. 22, October Term, 1961 (April 23, 1962). In *Scholle*, at least half of the Michigan Court refused to reach the merits of the action.

Unlike the "crazy quilt" apportionment attacked in *Baker* (CLARK, J., concurring, 30 U.S.L. Week at 4224), New York has a rational, consistently followed formula for allocating state legislative seats; this formula was held valid by the three-judge Court. It is significant that appellants show no conflict between the Court's dismissal of the

complaint on its merits, and the settled course of decisions by this Court under the Fourteenth Amendment. The reason is obvious; the dismissal was fully in line with the settled interpretation of the Fourteenth Amendment. It is for this reason that appellants dwell exclusively on the recent decision in *Baker*, although it lends no support whatsoever to their position.

(B)

If there was ever any doubt that previous cases had decided—on the merits—that a state may "assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses" (*MacDougall* v. *Green*, *supra* at 284) by granting the smaller counties somewhat greater representation in the state legislature than they would have if population were the only criterion for apportionment, this Court dispelled that doubt in its *Baker* opinion. That opinion (30 U.S.L. Week at 4208) pointed out that *MacDougall* v. *Green*, *supra*, affirmed on the merits Illinois' right to require that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties.

In *MacDougall*, this Court stated that (335 U. S. at 283-84):

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this court, applying such broad Constitutional concepts as due process and equal protection of the laws, to deny a state the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have prac-

> tical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Appellants' theory contrasts sharply with the classic statement of this Court in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911), lately re-emphasized in *Morey* v. *Doud*, 354 U. S. 457, 463-64 (1957):

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:
>
> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

According to the 1960 census, the six counties represented by the six individual appellants had a population

of 9,526,948, or 56.8% of the total state population. They are represented by 72 Assemblymen and 28 Senators—48.0% of the Assembly and 48.3% of the Senate. Thus, the other 56 counties, with 43.2% of the State's population, have 52.0% of the total Assembly and 51.7% of the total Senate seats.

It cannot be argued seriously that this apportionment is without "reasonable basis." It is apparent, rather, that appellant relies on "mathematical nicety," despite this Court's clear rejection of such a test.

Two rationales for the New York legislative apportionment stand out. The first, fortified by this Court's holding in *MacDougall* v. *Green*, *supra*, is that it is reasonable to assure that the interests of the six counties involved in this appeal do not ride roughshod over the interests of the remaining 56 counties; as this Court pointed out, the thickly populated areas have myriad opportunities for exerting their political weight at the polls which are not available to the other counties—for example, in elections for statewide offices. Second, a legislator in a sparsely populated county, although he represents comparatively few people, represents a constituency that spans a relatively large geographical area.* Obviously the task of the up-state legislator is very different from that of the

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*The six counties in which appellants reside contain 56.8% of the population of the State, but they constitute only 3.1% of its area. Four of them—Bronx, Kings, New York and Queens—make up, along with Richmond (not involved in this suit), New York City; these are the smallest counties in the State. The other two, Nassau and Suffolk, are part of New York City's metropolitan area. Nassau has the ninth smallest area of the state's 62 counties. Suffolk, alone of the six counties here represented, has a fairly large area; its "under-representation" in the legislature is explained not only by its identification with the metropolitan area but also by its sudden population growth—from 1950 to 1960, its population went up 141% as compared with a population rise of 13.2% for the state as a whole (Figures from decennial census of 1950 and 1960).

down-stater. It is certainly reasonable to take geography as well as population into account in apportioning legislative seats.

And the staunchest advocates of the *Baker* decision have recognized this. They have pointed out that

> "constitutional statecraft often involves a degree of protection for minorities which limits the principle of majority rule. Perfect numerical equality in voting rights would be achieved if an entire State legislature were elected at large but the danger is too great that the remote and less populated sections would be neglected or that, in the event of a conflict between two parts of the State, the more populous region would elect the entire legislature and in its councils the minority would never be heard." Amicus Brief for the United States, *Baker* v. *Carr*, pp. 29-30.

See also Lewis, "Legislative Apportionment and the Federal Courts," 71 Harv. L. Rev. 1057 n. 3 (1958).

Similarly, appellants' attempt (Jurisd. Statement, App. C) to psychoanalyze the 1894 Constitutional Convention falls wide of the mark. See *McGowan* v. *Maryland*, 366 U. S. 420, 425-26, 468-69 (1961); *Kotch* v. *Board of Pilot Comm'rs.*, 330 U. S. 552 (1947).

Thus, it is clear that the District Court's dismissal of this complaint was consistent with this Court's prior holdings under the Fourteenth Amendment and the subsequent *Baker* case. The questions raised by appellants are clearly not substantial.

(C)

Appellants also refer (Jurisd. Statement, p. 9) to an alternative holding proposed in Judge LEVET's opinion; he had concluded that the complaint should be dismissed not only because it failed to state a claim—the holding

of the Court—but also because it lacked equity or justiciability. This conclusion was of course not part of the District Court's holding since it was adopted by neither of the concurring judges. Thus, it fails to raise substantial questions worthy of consideration by this Court or of remand to the District Court.

CONCLUSION

This appeal presents no substantial questions of public importance. The United States District Court correctly determined the issues on the merits in accord with *Baker* v. *Carr* and other relevant decisions of this Court. Therefore, the judgment should be affirmed or the appeal dismissed.

Dated: New York, New York, April 25, 1962.

Respectfully submitted,

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